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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED, PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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I.

Statement of Case.

This action was brought under the authority of the Federal Employers' Liability Act. One Joseph Rocco was killed while engaged in his employment for the Lehigh Valley Railroad Company.

The decedent was employed as a track inspector on a branch of defendant's railroad running between Auburn, N. Y., and Ithaca, N. Y. Ithaca, N. Y., is the

south terminus of the branch. His duty was to inspect the track twice each day from Ithaca, the south terminus of the branch, to the end of the Ithaca section, about seven and a half miles north of Ithaca. He had been employed by the Lehigh Valley Railroad Company for between twenty and twenty-five years (R. 20). He covered his assigned section by means of a three wheeled vehicle known by railroad men as a "speeder." The speeder is a three wheeled vehicle operated by foot and carries equipment for making minor repairs along the tracks. It is built so that it can be readily picked up and removed from the tracks (R. 113).

The branch of the railroad upon which the decedent worked runs along the shore of Cayuga Lake and in stormy weather the track is subject to washouts (R. 95, 96). The primary purpose of his work was to protect the two passenger trains a day which traverse the branch line, two in each direction, between Auburn and Ithaca.

He preceded each passenger train in each direction. At the time the decedent met his death, a train left Ithaca at 7:40 o'clock in the morning for Auburn. On its return trip it arrived in Ithaca at 12.23 P. M. It departed again for Auburn at 4:55 P. M. and returned to Ithaca from Auburn at 8:30 P. M. (R. 21). The decedent's schedule was as follows: He left Ithaca at 6:30 in the morning and proceeded north to the end of his assigned track. He returned to Ithaca at 12 o'clock, went out again at 3:30 in the afternoon and came in at 8 o'clock at night (R. 20, 43, 44). It thus appears that he preceded by a short time the passenger trains running in each direction.

On the Auburn and Ithaca branch, in the latter part of October or early part of November, 1920, there was promulgated a rule that track walkers should not

occupy the main track with speeders or any other obstructions, without first ascertaining from the operator the whereabouts of the approaching trains in both directions (R. 163). The decedent was specifically and repeatedly instructed as to the rule and warned against infractions thereof (R. 111, 112, 115, 123, 124, 147, 148). His predecessor, in the year 1921, had received the same instructions (R. 49). On the day the decedent was killed, December 8, 1927, there had been heavy washouts on the Ithaca-Auburn branch. They occurred all along the line by reason of heavy storms (R. 34, 35, 169). By reason of the washouts the train southbound from Auburn to Ithaca, due to arrive in Ithaca at 12:23 P. M., was delayed and reached Ludlowville, N. Y., the last reporting station prior to reaching Ithaca, at 3:14 P. M. (R. 150). Ludlowville is eight miles north of Ithaca (R. 155).

On that day Rocco left Ithaca at 3:30 P. M. without making inquiry as to the whereabouts of the train (R. 122, 123). He collided with the train at a point approximately 663 feet north of the highway crossing leading into Stewart Park in the City of Ithaca. He was struck by the train due in Ithaca at 12:23 and was killed (R. 64, 78). After stopping because of the accident, the train proceeded to Ithaca and arrived in Ithaca at 4 P. M. (R. 151).

All the facilities of the railroad were afforded the decedent for his protection from trains (R. 124, 125). Had Rocco inquired of the dispatcher he would have been informed that the train which struck him had left Ludlowville, eight miles north of Ithaca, at 3:14 P. M. (R. 155). It would then have been left to Rocco himself to determine at what time he wanted to leave the station to clear this train (R. 125).

II.

ARGUMENT.

A. The violation by the decedent of the rule requiring him to ascertain the location of trains before putting his speeder on the track, was the primary cause of the accident and the sole proximate cause thereof.

In addition to the rule which required the decedent to make inquiry regarding any trains which he might encounter, there was another rule of the railroad governing the conduct of the decedent. Rule 823, promulgated by the Lehigh Valley Railroad Company provided as follows:

> "Employees must stand outside and clear of all main tracks while trains are passing; they must expect trains to run at any time, on any track, in either direction. All employees are further warned that they must not rely on others to notify them of the approach of a train" (R. 245, 246).

Thus, under the rules governing the decedent's employment, trains had superior rights on the tracks and the decedent's rights were subordinate. Under the decedent's contract of employment, it was his duty to give to trains upon the track the right of way, and his was the primary duty of avoiding a collision. Every communication facility of the railroad was afforded him for his protection.

The only issue upon the trial regarding the contributory negligence of the decedent was in respect to his failure to ascertain the whereabouts of the trains before proceeding upon the track with his speeder, and his resulting failure to be "clear of the track." The jury

found the decedent guilty of contributory negligence, assessed plaintiff's damages at $12,096, and, pursuant to the provisions of the Federal Employers' Liability Act, reduced plaintiff's damages by 40% because of the contributory negligence of the decedent. This, upon the issues as tried, despite the absence of a special verdict, was tantamount to a finding by the jury that the decedent violated the existing rule requiring him to ascertain the location of the trains before occupying the track. The Court of Appeals of the State of New York has, following the State and Federal authorities, determined that the violation of said rule constituted the primary and sole proximate cause of decedent's death.

The plaintiff relied solely upon a claim of negligence on the part of the engineer of the train which collided with Rocco as a basis of her cause of action. It was claimed that his neglect was a failure to give a warning signal. No negligence of any other officer or employee of the railroad was claimed. If we examine the respective duties of the engineer and of the decedent in the light of existing rules which guided those employees, no other conclusion can be drawn except that Rocco's negligence was not only the sole proximate cause of his death, but that no evidence of any kind supports any finding of negligence on the part of the engineer of the train which collided with him.

It is urged by the petitioner that the Court of Appeals of the State of New York is in error because, to support its determination, there must have been an absolute written prohibition against his occupying the track with his speeder. That such a rule existed, and that Rocco violated it, is supported by the verdict which found that the decedent was guilty of contributory negligence (R. 1). The record abounds with undisputed testimony that there was such a rule, that Rocco was instructed upon it and was warned against its

violation (R. 111, 112, 115, 123, 124, 147, 148, 163). If any explanation be necessary as to why it was not printed in the general rule book, the explanation is that on no other part of the system was such vehicle used (R. 95). A general rule of like import respecting the use of motor vehicles was promulgated and printed (R. 165, 166).

The petitioner also argues that a freight train having left Ludlowville at 2:30 P. M. and not having arrived at Ithaca at 3:30 P. M., the decedent, had he inquired and ascertained such fact, would have been justified in believing that both trains were held up by washouts in his patrol section. This argument is based on assumptions contradicted by the facts. The distance from Ludlowville to Ithaca is eight miles. The decedent's patrol section extended from Ithaca towards Ludlowville a distance of seven and a half miles (R. 20). He had thus returned at 12 o'clock noon on the day he was killed, from his inspection trip to a point within a half a mile of Ludlowville, and knew the fact to be that there were no washouts in his patrol section. In fact, on the day he was killed, Gabriel Rocco, his son, was engaged with a gang repairing washouts, and when the train which killed the decedent passed the gang in which Gabriel Rocco was working, the tracks had been repaired to Kings Ferry (R. 35, 40, 41). Kings Ferry is two stations north of Ludlowville (R. 150). It would be equally inferable that had Rocco gone to the dispatcher's office he would have been informed that there were no washouts between Ludlowville and Ithaca.

Rocco well knew that the pickup freight, which had left Ludlowville at 2:30 P. M., had other work to do on its return trip to Ithaca and had no particular schedule (R. 33). The pickup had switching to do at Ludlowville and Portland Point. Portland Point is

between Ludlowville and Ithaca, about one mile south of Ludlowville (R. 161). The decedent, having worked for the Lehigh Valley Railroad Company for twenty-five years, and well knowing that the pickup freight had switching work to do at Portland Point after leaving Ludlowville, certainly knew, or had reason to know, that its failure to arrive in Ithaca prior to 3:30 was not the result of any washout.

It is submitted that upon the facts, the only conclusion to be drawn is that the decedent realizing that a train on schedule time would not be encountered by him, failed to take the precaution which he would have taken had he acquainted himself with the fact that the train that killed him was late. It can readily be seen that had Rocco made inquiry, he would not have started on his trip until he had given the train which had left Ludlowville at 3:14, sufficient time under its regular run schedule, to reach Ithaca. That train, after having been delayed because of the accident, reached Ithaca at 4 o'clock and struck Rocco about 3:30 P. M., when he was still in the City of Ithaca. It takes but little computation to determine that the train would have cleared Rocco's patrol section within about five minutes after Rocco started out. Inquiry would have informed him of the fact that in that short time the train would have cleared.

B. The law is well settled that under the facts disclosed in the case at bar, there can be no recovery under the Federal Employers' Liability Act.

What the respective duties of the engineer and the decedent were with respect to the use of the track, has been discussed above. In general terms, under the rules under which the employees worked, and upon which both had a right to depend, Rocco's duty was to avoid

trains which might be on the track, and the engineer's duty was to proceed in reliance upon that rule and to refrain only from wilfully running down Rocco.

It may be stated here that the plaintiff's only claim of negligence on the part of the engineer was his failure to blow a whistle warning Rocco. It will appear from pages 11 and 12 of petitioner's brief that the petitioner advances two reasons why the engineer was under a duty to signal. They are as follows:

1. A rule of the Lehigh Valley Railroad Company not quoted by the petitioner, the substance of which is misstated in petitioner's brief.

2. A common law duty on entering blind curve, to signal where the engineer knew, or should have known, men might be at work.

In dealing with the rule in question, for the purpose of clarity in the record, the respondent here sets forth the language contained in the petitioner's brief wherein the petitioner purports to set forth its substance.

> *"The plaintiff introduced in evidence a written rule of the defendant requiring the engineer when approaching curves and other points where employees may be at work on tracks or bridges, or when approaching highway crossings or running against the current of traffic, to sound short blasts of the whistle"* (R. 54). Italics ours. (Petitioner's brief, pages 11 and 12).

The rule introduced at page 54 of the record which the petitioner purports to state in substance, is of entirely different import. The rule in question is rule 14, Subdivision d, paragraph q. The symbol "O" signifies a short blast of the whistle, and the symbol "——" a long blast. Section 14 of the rule book contains many subdivisions and treats with the signals

to be given by the engineer under various conditions and circumstances. The exact language of the rule is as follows:

> "O——O. Running against the current of traffic; when approaching highway crossings immediately after sounding the prescribed whistle signal and approaching curves and other points where employees may be at work on track or bridges" (R. 54).

Thus the rule provides that when a train is running against the current of traffic, under certain circumstances and conditions, three blasts of the whistle must be blown, first a short blast, then a long blast, and then another short blast.

The Ithaca branch is a single track road (R. 162). The rule being printed in the rule book in bold face type, on its face does not apply to single track roads (R. 162). It is common knowledge that the expression "running against the current of traffic" applies only to running trains on double track roads in a direction opposite to the customary flow of traffic. The rule is certainly inapplicable and negligence cannot be charged to the engineer by virtue of it. Furthermore, as will appear from the argument herein, the engineer had no right to expect Rocco to be in occupation of the track.

In discussing the petitioner's theory that at common law, ordinary care on the part of the engineer required him to give a warning signal upon approaching the curve in question, it may be clearly demonstrated that the case at bar falls definitely within the doctrine of *Unadilla Valley Railroad v. Caldine,* 278 U. S. 139.

Upon the undisputed evidence and by the finding of the jury, Rocco had violated a rule promulgated for his own safety. He had neglected to provide himself

with information which was available to him, which he was required to obtain, and from which he could have ascertained the location of the train and protected himself accordingly. As a result thereof he placed himself in a position of danger on the track beyond a curve around which the train was approaching. The engineer had no knowledge and was not bound to infer or presume that Rocco would disregard the rule and thereby disregard his duty to avoid oncoming trains. There was no duty upon the engineer to assume that Rocco or any other employee would violate his duties and place himself in danger. To impose upon the engineer a legal obligation to give a warning to Rocco, who, by virtue of the rules under which he was employed, was required not to be on the track, and was required to inform himself of the locations of trains and stand "outside and clear of the track," would be violative of the doctrine of the *Caldine* case and every case of similar character upon which this Court has written, and of all reported decisions of the State and Federal Courts.

The case clearly falls within the well established rule that a recovery may not be had under the Federal Employers' Liability Act where a plaintiff places himself in a position of danger by his own negligence and violation of the rule of his employment because some other person did not anticipate his negligent act and act to prevent injuries because thereof.

Davis, Agent, v. Kennedy as Administrator, 266, U. S. 147.

Great Northern Railroad Co. v. Wiles, 240 U. S. 444.

Southern Railway Co. v. Gray, 241 U. S. 333.

Frese v. C. B. & Q. R. R., 263 U. S. 1.

Unadilla Valley Railway Co. v. Caldine, 278 U. S. 139.

The case falls specifically within the facts and the doctrine pronounced by this Court in *Chesapeake & Ohio R. R. Co. v. Nixon,* 271 U. S. 218. The cases are indistinguishable as to the conduct of the respective plaintiffs. In the *Nixon* case the train came from behind, overtaking and colliding with a similar vehicle on a straight stretch of road. The jury found that the engineer was not on the watch and this Court deemed itself bound by that finding. This Court said:

> "If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees."

In the case at bar, there is no claim that the engineer was not watching and a search for the engineer's negligence discloses nothing more than his failure to anticipate that Rocco might have been negligent and warn him if he was. It is submitted that no case could fall more closely within those cases decided by this Honorable Court which guided the Court of Appeals of the State of New York, than the case at bar. The engineer of the train which struck Rocco was entitled to expect that Rocco would use the means of self-protection given to him and avoid placing himself in a position of danger.

No better summary of the law of the case may be made than by quoting the language of Mr. Justice Davis of the Supreme Court, Appellate Division, Third Department, of the State of New York, when the case at bar was considered by that Court.

"There is nothing to indicate that there was any duty on the part of the engineer to give a signal at the point where the accident occurred, or that the decedent relied on such a signal. The latter went forth without vital information he might readily have obtained, and the unfortunate accident followed as a result of that primary cause. The burden of responsibility may not so easily be shifted to another by saying that the engineer should have given a whistle signal before rounding the curve, and therefore comparison may be made between negligent acts."—(R. 261.)

Conclusion.

It is respectfully submitted that the record in this case shows conclusively that no question of law is involved requiring the granting of the petition herein. No undetermined or peculiar question arises under the provisions of the Federal Employers' Liability Act.

No federal question of substance not heretofore determined by this Court was raised or involved in the trial of the action. Nothing was decided in the State Court in any manner not in accord with the applicable decisions of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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